United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-7468

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

P/S

GAYLE MC QUOID HOLLEY, Individually and on behalf of JAMES MC QUOID, NORMAN MC QUOID, THOMAS MC QUOID, DOUGLAS MC QUOID, MICHAEL MC QUOID AND ADELAINE MC QUOID, her minor children,

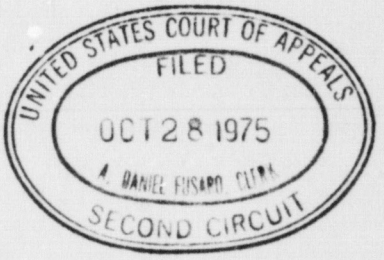
Plaintiffs,

- against -

Docket # 75-7468

ABE LAVINE, as Commissioner of the NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, and JAMES REED, as Commissioner of the MONROE COUNTY DEPARTMENT OF SOCIAL SERVICES,

Defendants.



APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT - APPELLEE MONROE COUNTY COMMISSIONER - JAMES REED

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QUESTIONS PRESENTED

1. DOES THE PLAINTIFF'S COMPLAINT STATE A SUBSTANTIAL CONSTITUTIONAL QUESTION?

THE DISTRICT COURT HELD IN THE NEGATIVE.

2. DOES THE COMPLAINT STATE A CLAIM UPON WHICH THE RELIEF SOUGHT BY PLAINTIFF CAN BE GRANTED?

THE DISTRICT COURT HELD IN THE NEGATIVE.

3. DOES THE COURT HAVE JURISDICTION OVER THE SUBJECT MATTER IN THIS CASE?

THE DISTRICT COURT HELD IN THE NEGATIVE.

STATEMENT OF CASE

In the United States District Court for the Western District of New York, PLAINTIFFS sought an order declaring Section 131-K (Social Services Law of New York State) invalid, and also a temporary restraining order and a permanent injunction restraining defendants from enforcement of section 131-K; they also sought the convening of a three-judge Court to hear and determine their constitutional challenge to section 131-K; they also sought damages by way of retro-active public assistance benefits, together with costs, disbursements and attorneys' fees.

Both appellees served Notices of Motions to Dismiss and the Court heard the arguments of all sides. By Order dated July 30, 1975, the Said District Court (Judge Burke) dismissed the plaintiffs complaint on the grounds of lack of jurisdiction over the subject matter, and because the complaint fails to state a claim upon which relief may be granted. A Judgment was entered on July 31, 1975.

The plaintiffs - Appellants now appeal from the aforesaid decision.

FACTS

Section 131-k of the New York State Social Services Law was enacted subsequent to the creation of section 233.50 (45 Code of FederalRegulations) which became effective January 2, 1974 (Appendix p. 16). Section 131-k entitled "Illegal Aliens", provides the following:

> 1. Any inconsistent provisions of this chapter or other law notwithstanding, an alien who is unlawfully residing in the United States or who fails to furnish evidence that he is lawfully residing in the United States shall not be eligible for aid to dependent children, home relief or medical assistance, except for a temporary period for thirty days in accordance with subdivision two of this section.
>
> 2. An otherwise eligible applicant or recipient who has been determined to be ineligible for aid to dependent children, home relief or medical assistance because he is an alien unlawfully residing in the United States or because he failed to furnish evidence that he is lawfully residing in the United States shall, nevertheless, be eligible to receive home relief and medical assistance for a temporary period not to exceed thirty days from the date of such determination in order to allow time for the referral of the cases to the United States immigration and naturalization service, or nearest the consulate of the country of the applicant or the recipient, and for such service or consulate to take appropriate action or furnish assistance.

Thereafter, New York State Regulation Section 349.93 (Title 18 N.Y.C.R.R) was created to implement the said New York Statute. (Appendix pp. 30 and 37).

By transmittal number 74-ADM-110, an Administrative Letter dated July 1[illegible], 1974, effective August 1, 1974, was sent to the local welfare Commissioners in New York State relative to 45 C.F.R. Section 233.50 (Appendix p. 37).

The plaintiff, an alien illegally residing in the United States, was accordingly timely and duly notified by the defendant Monroe County Department of Social Services that she was being deleted from the welfare grant - at the same time, she was notified that her six United States citizen children would remain on the public assistance rolls. The said plaintiff was taken off the grant and the children still remain on the rolls as full public assistance recipients. At a hearing requested by the plaintiff, testimony was taken, and the State Department of Social Services affirmed the action of the defendant Monroe County Welfare Commissioner, James Reed, in deleting the said plaintiff from the grant, citing the aforementioned state regulation, and the further fact that the United States Department of Justice, Immigration and Naturalization has determined that the plaintiff, GAYLE MC QUOID HOLLEY, is an alien, illegally in the United States.

The said plaintiff, GAYLE MC QUOID HOLLEY, married one WAYNE HOLLEY sometime in the fall of 1974; the said WAYNE HOLLEY has applied to the defendant REED for the issuance of food stamps - this application had not as yet been approved by the time this action began. Plaintiff's said husband has been receiving the sum of $289.00 each month from the Social Security Administration. The said WAYNE HOLLEY lives with the plaintiff, GAYLE MC QUOID HOLLEY, and he and his said spouse and her six (6) children reside as a family together in the City of Rochester, New York.

The total income which the said plaintiff and her said husband receive each month is $289.00 Social Security plus $593.81 ADC for the six (6) children. Even with the said GAYLE MC QUOID HOLLEY out of the welfare grant, at the present time, is approximately $882.81 per month.

POINT 1

A SINGLE JUDGE LACKS JURISDICTION TO ISSUE A PRELIMINARY INJUNCTION. IN ADDITION, PLAINTIFFS HAVE FAILED TO MEET THE BURDEN PLACED ON THEM TO JUSTIFY THE GRANTING OF A RESTRAINING ORDER.

THE PLAINTIFFS HEREIN SEEK AN ORDER ENJOINING THE OPERATION OF A STATE STATUTE (SECTION 131-K), AND A STATE REGULATI N (TITLE 18 N.Y.C.R.R. SECTION 349.3), THE SAID STATE STATUTE HAVING BEEN CREATED SUBSEQUENT TO THE PROMULGATION BY THE FEDERAL ADMINISTRATION OF SECTION 233.50 OF THE CODE OF FEDERAL REGULATIONS (APPENDIX P.16). THE SAID STATE REGULATION IS ONE OF STATE-WIDE APPLICABILITY.

UNDER SECTION 2281, 28 U.S.C., A SINGLE JUDGE LACKS JURISDICTION TO ENJOIN THE OPERATION OF A STATE STATUTE, AND UNDER DECISIONAL LAW, THAT LIMITATION HAS BEEN EXTENDED TO STATE REGULATIONS OF STATE-WIDE APPLICABILITY. THE SUPREME COURT HAS STATED THE FOLLOWING:

> "...A THREE JUDGE COURT...IS REQUIRED (FOR INJUNCTIVE RELIEF) WHERE THE CHALLENGED STATUTE OR REGULATION, ALBEIT CREATED OR AUTHORIZED BY THE STATE LEGISLATURE, HAS STATE-WIDE APPLICATION OR EFFECTUATES A STATE-WIDE POLICY....."

(BOARD OF REGENTS OF THE UNIVERSITY OF TEXAS SYSTEM v. NEW LEFT EDUCATION PROJECT, 404 U.S. 541); Charleston v. Wohlgemuth, 332 F.Supp. 1175; People v. Gonzales (____F.Supp____), decided 10/31/73 (D.C.New York)

ADDITIONALLY, THE PLAINTIFFS FAIL TO MEET THE BURDEN CAST UPON THEM FOR A PRELIMINARY INJUNCTION. IF THE COURT WERE TO GRANT THEIR REQUEST FOR A TEMPORARY RESTRAINING ORDER, AND THE COMPLAINT WAS THEREAFTER DISMISSED, ALL MONIES PAID BY THE WELFARE DEPARTMENT WOULD HAVE BEEN PAID TO INELIGIBLE PERSONS - YET, IN ALL LIKLIEHOOD, THE DEPARTMENT WOULD BE UNABLE TO RE-COUP SAID MONIES, AND SINCE WELFARE BENEFITS ARE PUBLIC MONIES, THE PUBLIC INTEREST WOULD BE

ADVERSLEY AFFECTED. AS STATED IN YAKUS V. UNITED STATES, 321 U.S. 414 AT 428, WHERE THE COURT HAD BEFORE IT A REVIEW OF A DENIAL OF A PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER....' THE COURT MAY ISSUE SUCH AN INJUNCTION ONLY IF IT FINDS THAT THE REGULATION, ORDER OR PRICE SCHEDULE IS NOT IN ACCORDANCE WITH LAW, OR IS ARBITRARY OR CAPRICIOUS.....' AND AT P.440, FURTHER SAID.....'BUT WHEN AN INJUNCTION IS ASKED WHICH WILL ADVERSELY AFFECT A PUBLIC INTEREST FOR WHOSE IMPAIRMENT,EVEN TEMPORARILY, AN INJUNCTION BOND CANNOT COMPENSATE, THE COURT MAY, IN THE PUBLIC INTEREST, WITHHOLD RELIEF UNTIL A FINAL DETERMINATION OF THE RIGHTS OF THE PARTIES, THOUGH THE POSTPONEMENT MAY BE BURDENSOME TO THE PLAINTIFF...'

IN ADDITION TO THE BURDEN ON THE PLAINTIFFS TO SHOW THERE IS A CLEAR AND PRESENT DANGER OF ILLEGAL ACTION ABOUT TO BE TAKEN (O'REILLY V. WYMAN, 305 F.S. 228 -D.C. NEW YORK), PLAINTIFFS MUST SHOW ULTIMATE LIKLIEHOOD OF SUCCESS (O'REILLY, IBID). THE COURTS DO NOT EASILY GRANT SUCH INJUNCTIVE RELIEF IN WELFARE CASES, SINCE THEY ARE AWARE OF THE TREMENDOUS TAX BURDEN ON THE CITIZENS OF THE STATE, AND THE GROWING EXPENDITURES FOR WELFARE BENEFITS. AS STATED IN ROSADO V. WYMAN, 414 F2D 170 -2ND CIR...'THE PRACTICAL EFFECT OF AN INJUNCTION IS TO ORDER THE LEGISLATURE TO APPROPRIATE MORE FUNDS FOR WELFARE....'.

AS THE SECOND CIRCUIT NOTED IN THE AREA OF 'PRELIMINARY INJUNCTION STANDARD', IN PRIDE V. THE COMMUNITY SCHOOL BOARD OF BROOKLYN, 488 F.2D 321 AT 324, THE PLAINTIFF MUST DEMONSTRATE EITHER A COMBINATION OF PROBABLE SUCCESS AND THE POSSIBILITY OF IRREPARABLE INJURY OR THAT IT HAS RAISED SERIOUS QUESTIONS GOING TO THE MERITS AND THAT THE BALANCE OF HARDSHIPS TIPS IN ITS FAVOR.

IN THE PLAINTIFFS' CASE, THE MONETARY NEED APPEARS TO BE LACKING SINCE PLAINTIFF'S HUSBAND, WHO RESIDES IN THE HOUSEHOLD, RECEIVES APPROXIMATELY $ 289.00 MONTHLY FROM SOCIAL SECURITY, AND PLAINTIFF, ON BEHALF OF HER SIX CHILDREN, AT THE PRESENT TIME, IS

RECEIVING FROM THE MONROE COUNTY DEPARTMENT OF SOCIAL SERVICES THE SUM OF $ 593.81 PER MONTH UNDER THE ADC CATEGORY. ALSO, AS A STEP-PARENT, THE PLAINTIFFS' HUSBAND, WAYNE HOLLEY, MAY BE LIABLE UNDER THE APPLICABLE LAW IN THE STATE OF NEW YORK, FOR THE SUPPORT, NOT ONLY OF HIS SPOUSE, THE PLAINTIFF HEREIN, BUT ALSO THE STEP-CHILDREN. FAMILY COURT ACT, SECTION 415 AND SOCIAL SERVICES LAW, SECTION 101; KELLOGG V. KELLOGG, 16 AD2D 731 (4TH DEPT.), AND MERCER V. MERCER, 26 AD2D 450 (1ST DEPT.). ALTHOUGH THE NEW YORK COURT OF APPEALS (UROVICH V. LAVINE, 35 NY2D 892) HAS RULED THAT A STEP-PARENT'S INCOME IS NOT TO BE CONSIDERED IN DETERMINING WHETHER HIS SPOUSE AND STEP CHILDREN ARE ELIGIBLE FOR PUBLIC ASSISTANCE, SUCH RULING HAS NO EFFECT ON THE MATTER OF A STEP-PARENTS' LIABILITY FOR SUPPORT OF THE STEP CHILDREN SO LONG AS THEY ARE RECIPIENTS OF WELFARE. THE 'UROVICH' CASE DEALS WITH WELFARE ELIGIBILITY, WHILE THE 'KELLOGG' AND 'MERCER' CASES DEAL WITH SUPPORT LIABILITY.

AS STATED BY THE APPELLATE DIVISION (MATTER OF SCARPELLI V. LAVINE, _____AD2D_____, 370 NYS2D 620, DECIDED ON JUNE 23,1975,)

> ....." WE DO NOT INTERPRET 'UROVICH' AS HOLDING THAT IN NO CASE MAY A STEP-PARENT'S INCOME BE DEEMED APPLICABLE TO THE STEP-CHILDREN, OR EVEN THAT THERE IS A PRE-SUMPTION OF NON-APPLICABILITY. IN EACH FAIR HEARING IT MUST BE DECIDED, ABSENT ANY PRESUMPTION, WHETHER THE STEP-PARENT, VIS-A-VIS THE STEP-CHILDREN, IS THE ONE WHO ACTUALLY SETS THE BREAD UPON THE TABLE....."

THE COURT CITED TAYLOR V. LAVINE, ____U.S.____,95 S.CT. 1741.

ALSO, THE PLAINTIFFS MUST SHOW 'PROBALE SUCCESS' IN ADDITION TO THE'POSSIBILITY OF IRREPARABLE HARM'(PRIDE, IBID); HERE, SHE SEEKS AN ORDER INVALIDATING A STATE STATUTE WITHOUT SHOWING AN INVIDIOUS DISCRMINATION IN THE APPLICATION OF THE PROVISIONS OF THE LEGISLATIVE ENACTMENT, AND WITHOUT SHOWING AN UNEQUAL APPLICATION OF THE WELFARE LAWS. WITHOUT A SUBSTANTIAL CON-

STITUTIONAL CLAIM, THE DISTRICT COURT IS WITHOUT JURISDICTION TO CONSIDER THE STATUTOTRY CLAIMS URGED HEREIN BY THIS PLAINTIFF. SEE: HAGANS V. WYMAN, 471 F2D 347 -2D. CIR.

POINT 2

THE COURT LACKS JURISDICTION OVER THE SUBJECT MATTER IN THIS CASE.

BEFORE A FEDERAL COURT CAN ACT ON A MATTER, THE PLAINTIFF MUST SHOW THAT SOME STATUTE CONFERS JURISDICTION, AND THAT THE COURT IS COMPETENT TO PASS ON THE ISSUES, AND A COURT IS COMPETENT TO ACT ONLY IF A STATUTE SO PROVIDES. IT IS CONTENDED BY DEFENDANT-APPELLEE REED THAT JURISDICTION IS NOT CONFERRED UNDER 28 U.S.C., SECTION 1331 BECAUSE THE AMOUNT IN CONTROVERSY DOES NOT EXCEED $10,000.00. DISTRICT COURT JURISDICTION UNDER SECTION 1331 GRANTING IT JURISDICTION OF MATTERS INVOLVING SUBSTANTIAL FEDERAL QUESTION REQUIRES NOT ONLY THAT THE ACTION ARISE UNDER THE CONSTITUTION, LAWS OR TREATIES OF THE UNITED STATES, BUT ALSO THAT THE MATTER IN CONTROVERSY EXCEDDS THE SUM OF $ 10,000.00. QUIMAULT TRIBE OF INDIANS V. GALLAGHER, 368 F2D 648, CERT. DEN.387 U.S. 907. THE COURT'S RULING IN RUSSO V. KIRBY, 453 F2D 548,552 -2D CIR.1972, ALSO TENDS TO NEGATE PLAINTIFF'S CLAIM ON JURISDICTIONAL GROUNDS. THE COURT, IN ITS OPINION STATED ...'THAT FACTS MUST BE ALLEGED TO SHOW THAT FEDERAL LAW IN THE PARTICULAR CASE CREATES A DUTY OR REMEDY, AND THAT THE CASE MUST ARISE DIRECTLY UNDER FEDERAL LAW.....'. THE PLAINTIFF MUST SHOW THAT THE RULE OF SUBSTANCE UNDER WHICH SHE CLAIMS TO HAVE A REMEDY IS THE PRODUCT OF FEDERAL LAW - HEREIN, SHE FAILS THE $ 10,000.00 TEST. 'AGGREGATION OF CLAIMS IS IMPERMISSIBLE (RUSSO V. KIRBY, SUPRA). PLAINTIFF CLAIMS THAT BY

COMPUTING THE AMOUNT OF THE WELFARE GRANT WHICH REPRESENTS HER SHARE, WHEN ADDED OVER A PERIOD OF YEARS, OR UNTILE THE MAJORITY AGE OF HER YOUNGEST CHILD IS REACHED, SHE MEETS THE MONETARY REQUIREMENT. IT IS CONTENDED THAT THAT APPROAC. CONTAINS MANY VARIABLES, AND AT BEST, 'INDIRECT' DAMAGES. EVEN IF PLAINTIFF WERE TO BE DECLARED ELIGIBLE FOR WELFARE BENEFITS, SHE MIGHT NOT REMAIN ON THE ROLLS. FOR EXAMPLE, WHEN HER YOUNGEST CHILD REACHES THE AGE OF SIX YEARS, SHE MIGHT BE REQUIRED TO ACCEPT EMPLOYMENT UNDER THE VARIOUS WORK PROGRAMS OF THE DEPARTMENT; HER ECONOMIC SITUATION COULD CHANGE FOR THE BETER, IN THAT SHE COULD BE THE WINNER OF A LOTTERY, OR SHE MIGHT BE INVOLVED IN AN AUTOMOBILE ACCIDENT, AND RECOVER SUBSTANTIAL DAMAGES; SHE MIGHT INHERIT F.NDS, ALL OF WHICH, OR ANY PARTICULAR ONE, COULD RESULT IN HER BEING TAKEN OFF THE ROLLS LONG BEFORE SHE MIGHT HAVE REALIZED AN ACCUMULATION EQUAL TO $10,000.00. IN ADDITION, SHE MIGHT MOVE FROM NEW YORK STATE.

SINCE PLAINTIFF IS AN ALIEN UNLAWFULLY RESIDING IN THE UNITED STATES, SHE CAN BE DEPORTED AT ANY TIME. THE DISTRICT DIRECTOR OF THE UNITED STATES DEPARTMENT OF JUSTICE (IMMIGRATION AND NATURALIZATION SERVICE) BY LETTER DATED OCTOBER 16, 1974, (APPENDIX P.36) ADVISED THE THEN CHIEF COUNSEL TO THE MONROE COUNTY DEPARTMENT OF WELFARE THAT THEIR RECORDS INDICATE THAT THE PLAINTIFF FIRST ENTERED THE UNITED STATES AS A NON-IMMIGRANT STUDENT ON JUNE 30, 1958 AND HER LAST ENTRY WAS APPARENTLY ON JANUARY 2, 1969, AT WHICH TIME SHE FALSELY CLAIMED TO BE A RETURNING LAWFUL PERMANENT RESIDENT OF THE UNITED STATES; THE LETTER GOES ON TO SAY THAT... ...'ALTHOUGH MRS. MCQUOID IS ILLEGALLY IN THE UNITED STATES, DEPORTATION PROCEEDINGS HAVE NOT BEEN INSTITUTED AGAINST HER FOR 'HUMANITARIAN REASONS' RELATING TO HER SIX UNITED STATES CITIZEN

CHILDREN ....'. THE SAID DIRECTOR GOES ON TO SAY THAT THE SERVICE DOES NOT CONTEMPLATE ENFORCING HER DEPARTURE AT THIS TIME, BUT SHOULD THE DEPENDENCY OF THE CHILDREN CHANGE, HER CASE WOULD BE REVIEWED FOR POSSIBLE ACTION CONSISTENT WITH CIRCUMSTANCES THEN EXISTING. ACCORDINGLY, SHE MIGHT BE DEPORTED AT ANY TIME, AND THE FACT OF HER MARRIAGE TO WAYNE HOLLEY WOULD IN NO MANNER, BAR A DEPORTATION PROCEEDING AGAINST HER. SEE: FIGUEORA V. IMMIGRATION AND NATURALIZATION SERVICE, 501 F2D 191 AT 195, WHERE THE COURT STATED:

"...A VALID MARRIAGE TO A UNITED STATES CITIZEN DOES NOT OF ITSELF EXEMPT AN ALIEN FROM DEPORTATION....."
(CITING: SILVERMAN V. ROGERS, 437 F2D 102-1ST CIR.)

IN ORDER FOR PLAINTIFF TO ESTABLISH JURISDICTION UNDER THE CIVIL RIGHTS ACT (42 U.S.C. SECTION 1983) WITH ITS INDISPENSABLE JURISDICTIONAL IMPLEMENTATION (28 U.S.C. SECTION 1343), SHE MUST ADVANCE A SUBSTANTIAL FEDERAL CLAIM. AN ALLEGATION THAT HER RIGHTS UNDER THE SOCIAL SECURITY ACT (42 U.S.C. SECTION 601 ET SEQ.) ARE BEING VIOLATED, MAY NOT BE A SUFFICIENT CLAIM FOR THE GRANTING OF JURISDICTION SINCE THE SOCIAL SECURITY ACT HAS BEEN HELD NOT TO BE AN ACT PROVIDING FOR THE PROTECTION OF CIVIL RIGHTS. ALMENARES V. WYMAN, 453 F2D 1075-2D CIR., CERT. DEN. 405 U.S. 944, ALSO LYNCH V. HOUSEHOLD FINANCE CORP., 405 U.S. 538.

IN ROSADO V. WYMAN, SUPRA, THE COURT STATED THAT 'INDIRECT DAMAGES' IS TOO SPECULATIVE TO CREATE JURISDICTION UNDER 28 U.S.C. SECTION 1331, AND FURTHER SAID....'IT IS FIRMLY SETTLED LAW THAT CASES INVOLVING RIGHTS NOT CAPABLE OF VALUATION IN MONEY, MAY NOT BE HEARD IN FEDERAL COURTS WHERE THE APPLICABLE JURISDICTIONAL STATUTE REQUIRES THAT THE MATTER IN CONTROVERSY EXCEED A CERTAIN NUMBER OF DOLLARS.....'. 414 F2D 170 AT 176.

POINT 3

THE PLAINTIFFS' COMPLAINT FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

THERE IS NO UNREASONABLE CLASSIFICATION IN THE ENACTMENT OF SECTION 131-K OF THE SOCIAL SERVICES LAW, AND ITS IMPLEMENTING REGULATION, TITLE 18 N.Y.C.R.R. SECTION 349.3. ONLY THAT PORTION OF THE WELFARE GRANT PERTAINING TO PLAINTIFF GAYLE MCQUOID HOLLEY WAS REDUCED - THE GRANT FOR THE CHILDREN HAS REMAINED INTACT. IN STATING THAT THE PLAINTIFFS' CONSTITUTIONAL ATTACK WAS INSUBSTANTIAL AND WITHOUT MERIT, THE COURT (OQUENDO V. INSURANCE COMPANY OF PUERTO RICO, 388 F.S. 1030, STATED THAT ....' THE ARGUMENT TAHT DUE PROCESS AND EQUAL PROTECTION UNDER THE CONSTITUTION OF THE UNITED STATES PRECLUDES THE ENACTMENT OF STATE STATUTTES WHICH ESTABLISH CLASSIFICATIONS AND HENCE DO NOT GIVE THE SAME TREATMENT TO ALL CITIZENS, WAS CLEARLY REJECTED IN MCGOWAN V. MARYLAND, 366 U.S. 420, THERE, THE SUPREME COURT STATED....'ALTHOUGH NO PRECISE FORMULA HAS BEEN DEVELOPED, THE COURT HAS HELD THAT THE FOURTEENTH AMENDMENT PERMITS THE STATES A WIDE SCOPE OF DISCRETION IN ENACTING LAWS WHICH AFFECT SOME GROUPS OF CITIZENS DIFFERENTLY FROM OTHERS. THE CONSTITUTIONAL SAFEGUARD IS OFFENDED ONLY IF THE CLASSIFICATION RESTS ON GROUNDS WHOLLY IRRELEVANT TO THE ACHIEVEMENT OF THE STATE'S OBJECTIVE.....'.

IT IS CONTENDED THAT THE NEW YORK STATE LEGISLATURE HAS MADE A LEGITIMATE EFFORT TO DISTINGUISH BETWEEN THOSE ALIENS WHO ARE LAWFULLY IN THE UNITED STATES AND THOSE WHO ARE NOT, AND THE STATUTE (IN CONFORMITY WITH THE FEDERAL REGULATION (45 C.F.R. SECTION 233.50) HAS A RATIONAL BASIS FOR FURTHERING A LEGITIMATE STATE INTEREST. THIS IS NOT AN ENACTMENT WHICH 'SWEEPS' INDISCRIMINATLEY

WITHOUT RESTRICTION, SUCH AS THE FACT SITUATION IN SUGARMAN V. DOUGALL. 413 U.S. 634, WHERE THE COURT DECREED THAT A NEW YORK STATE STATUTE (CIVIL SERVICE LAW, SECTION 51-3) WHICH DENIED ALIENS THE RIGHT TO HOLD POSITIONS IN NEW YORK'S CLASSIFIED COMPETITIVE CIVIL SERVICE, VIOLATED THE FOURTEENTH AMENDMENT'S EQUAL PROTECTION GUARANTEES IN THAT THE STATUTE SWEPT INDISCRIMINATLEY AND WAS NOT RESTRICTED. ON THE OTHER HAND, SECTION 131-K IS RESTRICTED (ONLY APPLIES TO ALIENS WHO ARE ILLEGALLY RESIDING IN THE UNITED STATES), IS NARROWLY CONFINED TO THAT CLASS ONLY, AND IS PRECISE IN ITS APPLICATION.

THE FEDERAL SUPREME COURT HAS STATED THAT WELFARE DEPARTMENTS AND THE STATES HAVE CONSIDERABLE 'LATITUDE' IN ALLOCATING THEIR AFDC RESOURCES, AND EACH STATE IS FREE TO SET ITS OWN STANDARD OF NEED, AND ...'TO DETERMINE THE LEVEL OF BENEFITS BY THE AMOUNT OF FUNDS IT DEVOTES TO THE PROGRAM.....IN THE AREA OF ECONOMICS AND SOCIAL WELFARE, A STATE DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE MERELY BECAUSE THE CLASSIFICATIONS MADE BY ITS LAWS ARE IMPERFECT. IF THE CLASSIFICATION HAS SOME 'REASONABLE BASIS', IT DOES NOT OFFEND THE CONSTITUTION SIMPLY BECAUSE THE CLASSIFICATION IS NOT MADE WITH MATHEMATICAL NICETY.....'. DANDRIDGE V. WILLIAMS, 397 U.S. 471, CITING: KING V. SMITH, 392 U.S. 309. EQUAL PROTECTION IS NOT DENIED WHEN A LEGISLATURE, IN DEALING WITH SOCIAL PROBLEMS, CHOOSES TO TAKE ONE STEP AT A TIME. WILLIAMSON V. LEE OPTICAL COMPANY, 348 U.S. 483, SO LONG AS THE LINE DRAWN BETWEEN STEPS IS RATIONALLY SUPPORTED. GEDULING V. AIELLO, 417 U.S. 484.

IN 7 CREIGHTON LAW REVIEW 647, THE CASE OF ESPINOZA V. FARAH MANUFACTURING CO.,(414 U.S. _____) IS ANALYZED. THE PLAINTIFF WAS A LAWFULLY ADMITTED RESIDENT ALIEN BORN IN MEXICO, WHO LIVED WITH HER HUSBAND, A UNITED STATES CITIZEN IN TEXAS. SHE APPLIED

FOR A SEAMSTRESS POSITION IN THE FARAH PLANT IN SAN ANTONIO. FARAH'S HIRING POLICY REQUIRED UNITED STATES CITIZENSHIP AS A PREREQUISITE TO EMPLOYMENT. THE PLAINTIFF FILED CHARGES CLAIMING DISCRIMINATION ON THE BASIS OF NATURAL ORIGIN IN VIOLATION OF TITLE VII OF THE CIVIL RIGHTS ACT OF 1964. THE FEDERAL DISTRICT COURT (TEXAS), 343 F.S. 1205, GRANTED SUMMARY JUDGMENT FOR ESPINOZA. THE ONLY ISSUE WAS WHETHER REFUSAL TO HIRE SOLELY BECAUSE OF LACK OF UNITED STATES CITIZENSHIP WAS PROHIBITED AS DISCRIMINATION ON THE BASIS OF NATIONAL ORIGIN. THE TRIAL COURT FOLLOWED THE MANDATE OF GRAHAM V. RICHARDSON, 403 U.S. 365, IN GIVING STRICT JUDICIAL SCRUTINY TO ANY DISCRMINATION AGAINST ALIENS, A SUSPECT CLASSIFICATION. IT CONCLUDED THAT 'CITIZENSHIP', 'NATIONALITY', 'ANCESTRY' AND 'HERITAGE' ARE ALL ENCOMPASSED WITHIN THE BROADER TERM 'NATIONAL ORIGIN' USED IN TITLE VII AND THAT CONGRESS INTENDED TO PROHIBIT DISCRIMINATION ON ANY SUCH BASIS. THE FIFTH CIRCUIT COURT OF APPEALS REVERSED THE DECISION OF THE TRIAL COURT. 462 F2D 1331 (5TH CIR.1972). IT NOTED THAT ...'FARAH'S POLICY MIGHT BE ARBITRARY AND CONGRESS COULD HAVE PROHIBITED SUCH A PRACTICE, BUT THAT CONGRESS HAD NOT SO ACTED....(7 CREIGHTON LAW REV. P.649).THE COURT OF APPEALS HELD THAT ESPINOZA WAS REFUSED EMPLOYMENT NOT BECAUSE OF NATIONAL ORIGIN, BUT SOLELY FOR LACK OF UNITED STATES CITIZENSHIP. The Supreme Court Affirmed (414 US____).

IT IS INTERESTING TO NOTE THAT IN 'ESPINOZA' THE PLAINTIFF WAS A LAWFULLY ADMITTED ALIEN (WHEREAS PLAINTIFF GAYLE HOLLEY IS NOT), AND THE DECISION WAS SUBSEQUENT TO THE DECISION IN 'RICHARDSON V. GRAHAM', IBID.

POINT 4

THE CONSTITUTIONAL CLAIM OF THE PLAINTIFFS IS IN-SUBSTANTIAL.

IT IS CONTENDED BY DEFENDANT-APPELLEE REED THAT THE PERTINENT STATE STATUTE INVOLVED HERE (SECTION 131-K) AND ITS' IMPLEMENTING REGULATION (SECTION 349.3) ARE COMPATIBLE WITH THE FEDERAL REGULATION, NAMELY, 45 C.F.R. SECTION 233.50; THAT THEY ARE NOT IN CONTRA-VENTION OF THAT REGULATION. THE PLAINTIFF ALLEGES THAT THE NEW YORK STATE STAUTUTE GOES CONTRARY TO 42 U.S.C., SECTION 602(A)(10), SECTION 402(A)(10) - YET, A CAREFUL READING OF THAT PARTICULAR SECTION SHOWS THAT IT DEALS WITH ALL 'ELIGIBLE' IN-DIVIDUALS; THE PLAINTIFF HEREIN IS NOT 'ELIGIBLE' IN ACCORDANCE WITH THE ABOVE LEGISLATION. (APPENDIX P.14). THE PLAINTIFF ALSO REFERS TO THE SOCIAL SECURITY ACT, 42 U.S.C. SECTION 301 ET SEQ. AS BEING THE FEDERAL STATUTORY AUTHORITY GOVERNING THE NEW YORK STATE ADC PROGRAM - AT ALLEGATION ENUMERATED '24' OF THE COMPLAINT OF THE PLAINTIFF (APPENDIX P.14), IS CITED SECTION 401 OF THE SOCIAL SECURITY ACT, 42 U.S.C. SECTION 601, WHICH REFERS TO 'NEEDY DEPENDENT CHILDREN AND THE PARENTS OR RELATIVES WITH WHOM THEY ARE LIVING'. HOWEVER, ALL MATTERS REGARDING ELIGIBILITY ARE TO BE DE-TERMINED BY THE STATES IN ACCORDANCE WITH FEDERAL STANDARDS. IT GOES WITHOUT SAYING THAT ALL 'ELIGIBLE' NEEDY PERSONS WILL RECEIVE PUBLIC ASSISTANCE, AND THOSE WHO ARE 'INELIGIBLE' SHALL NOT, OTHERWISE WHY HAVE ANY REQUIREMENTS AND ELIGIBILITY STANDARDS, SUCH AS MONETARY LEVELS, INQUIRIES AS TO RESOURCES, POTENTIAL ASSETS AND THE LIKE. (SEE: 18 N.Y.C.R.R. SECTION 352.23 AS TO 'UTILIZATION OF RESOURCES', AND <u>BROWN V. BATES</u>, 363 F.S. 897, WHICH SETS FORTH THE FOLLOWING:

"...A STATE PLAN FOR AID AND SERVICES TO NEEDY FAMILIES

...(7) EXCEPT AS MAY OTHERWISE BE PROVIDED IN CLAUSE (8), PROVIDE THAT THE STATE AGENCY, SHALL, IN DETERMINING NEED, TAKE INTO CONSIDERATION ANY OTHER INCOME AND AND RESOURCES OF ANY CHILD OR RELATIVE CLAIMING AID TO FAMILIES WITH DEPENDENT CHILDREN....."

(42 U.S.C. SECTION 602(A)(7).

THAT ALL WELFARE IS BASED ON ELIGIBILITY IS FURTHER MANDATED BY THE FEDERAL REGULATIONS, 45 C.F.R. SECTION 233.20 ET SEQ., IN SETTING FORTH GUIDELINES RELATIVE TO THE PUBLIC ASSISTANCE PROGRAMS, AS STATED IN 'BATES;IBID AT PAGE 899.....

...'REQUIREMENTS FOR STATE PLANS. A STATE PLAN FOR...AFDC...MUST, AS SPECIFIED BELOW:

'...(1) GENERAL. PROVIDE THAT THE DETERMINATION OF NEED AND AMOUNT OF ASSISTANCE FOR ALL APPLICANTS AND RECIPIENTS WILL BE MADE ON AN OBJECTIVE AND EQUITABLE BASIS, AND ALL TYPES OF INCOME WILL BE TAKEN INTO CONSIDERATION IN THE SAME WAY, EXCEPT WHERE OTHERWISE SPECIFICALLY AUTHORIZED BY FEDERAL STATUTE.....'

IT IS SUBMITTED THAT THE WITHIN PLAINTIFF IS NOT ENTITLED TO PUBLIC ASSISTANCE EITHER UNDER THE STATE AND/OR FEDERAL REGULATIONS - THAT SHE DOES NOT COME WITHIN THE SCOPE OF EITHER AS DETERMINED BY THE STANDARDS OF ELIGIBILITY.

AT PAGES 26-27 OF THE PLAINTIFF'S MEMORANDUM OF LAW ARE CITED CASES WHICH TEND TO DIS-ALLOW THE DELETING OF THE MOTHER FROM THE GRANT WHERE THE CHILDREN ARE NEEDY. HOWEVER, TWO (2) DECISIONS OF THE UNITED STATES SUPREME COURT HAVE RECENTLY RULED THAT THE MOTHER AND THE CHILDREN CAN BE TAKEN OFF THE GRANT WHERE THE MOTHER IN THE ONE CASE REFUSES TO EXECUTE A MORTGAGE WHEN REQUESTED IN FAVOR OF THE DEPARTMENT OF WELFARE, AND WHERE, IN THE OTHER, THE MOTHER REFUSES TO ALLOW A CASEWORKER INTO HER HOME. (SEE; SNELL V. WYMAN, 281 F.S. 853, AFFIRMED IN 393 U.S. 323 -DECIDED 1970; AND WYMAN V. JAMES, 400 U.S. _____. THE SIGNIFICANCE OF BOTH CASES APPEARS

TO BE THAT FACTORS OTHER THAN 'NEED' MAY BE TAKEN INTO CONSIDERATION WHEN DETERMINING WELFARE ELIGIBILITY STANDARDS.

IT IS SUBMITTED THAT THE PLAINITFF IS NOT IN THE UNITED STATES UNDER 'COLOR OF LAW', AND IN FACT, HAS NO STANDING AT ALL WHILE RESIDING IN THIS COUNTRY. SHE TESTIFIED AT THE FAIR HEARING THAT SHE DOES NOT HAVE ANY PAPERS OR CARDS IN ACCORDANCE WITH THE IMMIGRATION AND NATURALIZATION SERVICE, AND HAS NEVER RECEIVED THE IMMIGRATION SERVICE FORMS WHICH SHOW THE STATUS OF ALIENS, IN PARTICULAR, INS FORM 1-94 - WHICH EVIDENCES THOSE IN THE COUNTRY 'UNDER COLOR OF LAW'. (APPENDIX PP.38,39 AND 40).

THE PLAINTIFF CLAIMS IN HER MEMORANDUM OF LAW THAT HER STATUS IN THIS COUNTRY IS AKIN TO THAT OF A'PAROLEE', YET THERE APPEARS TO BE NOTHING IN HER MOVING PAPERS OR HER COMPLAINT TO GIVE SUBSTANCE TO THAT STATUS. IN FACT, FOR THOSE WHO ARE 'PAROLEES' THERE APPEARS TO BE SPECIAL IDENTIFICATION FROM THE IMMIGRATION AND NATURALIZATION SERVICE, NAMELY, AN ENDORSEMENT ON INS FORM I-94 TO SHOW THAT ONE HAS BEEN PAROLED. (SEE; PARAGRAPH 4,SUB.B OF PART III OF ADMINISTRATIVE LETTER DATED JULY 15, 1974, 74-ADM 110,). (APPENDIX P.40).

ACCORDINGLY, IT IS CONTENDED THAT THE PLAINTIFF'S CLAIM IS NOT SUBSTANTIAL, AND UNDER EXISTING DECISIONAL LAW, UNLESS THE PLAINTIFF MEETS HER BURDEN OF SHOWING A SUBSTANTIAL CLAIM THE DISTRICT COURT LACKS JURISDICTION TO CONSIDER THE STATUTORY CLAIM URGED HEREIN BY THE PLAINTIFF. HAGANS V. WYMAN, 415 F2D 528 - 2D CIR.(1974). IN ACEDO V. NASSAU COUNTY, NEW YORK, 500 F2D 1078 - 2D CIR., DECIDED JULY 2, 1974, AN ACTION WAS BROUGHT FOR ALLEGED CIVIL RIGHTS VIOLATIONS IN THAT NASSAU COUNTY ABANDONED PLANS FOR BUILDING LOW INCOME HOUSING FOR A PARCEL OF LAND AT MITCHELL FIELD. THE DEFENDANTS CONTINUED THEIR PLANTO BUILD SUCH HOUSING FOR SENIOR

CITIZENS, BUT ABANDONED IT AS TO LOW INCOME FAMILIES. AFTER A TRIAL, THE DISTRICT COURT CONCLUDED THAT THE ABANDONMENT OF THE HOUSING PLAN FOR LOW INCOME FAMILIES WAS NOT ILLEGAL BECAUSE IT HAD NEITHER A DISCRIMINATORY EFFECT, NOR A DISCRIMINATORY MOTIVE, AND ACCORDINGLY DISMISSED THE COMPLAINT. THE COURT OF APPEALS (SECOND CIRCUIT) AFFIRMED ON THE GROUND THAT THE APPELLANTS FAILED TO STATE A CLAIM UPON WHICH RELIEF COULD BE GRANTED, SAYING THE FOLLOWING:

> "...HERE APPELLANTS ARE ATTEMPTING TO IMPOSE ON THE GOVERNMENT OFFICIALS AN AFFIRMATIVE DUTY TO CONSTRUCT HOUSING. THIS IS CLEARLY NOT REQUIRED BY ANY PROVISION OF THE CONSTITUTION...THERE IS NO AUTHORITY HOLDING THAT ONCE A CITY OR COUNTY INITIATES LOW INCOME SENIOR CITIZEN HOUSING, THE FOURTEENTH AMENDMENT REQUIRES IT TO BUILD A CERTAIN AMOUNT OF LOW INCOME FAMILY HOUSING TOO. (IN JEFFERSON V. HACKNEY, 406 U.S. 535), THE COURT UPHELD A STATE SCHEME WHICH GAVE HIGHER GRANTS TO AGED, BLIND AND DISABLED PERSONS THAN TO RECIPIENTS UNDER THE AID TO FAMILIES WITH DEPENDENT CHILDREN PROGRAM ON THE GROUND THAT THE LEGISLATURE MIGHT RATIONALLY CONCLUDE THAT THE LATTER COULD MORE EASILY BEAR THE HARDSHIPS OF INADEQUATE INCOME, 406 U.S. AT 549... FURTHER QUOTING THE 'JEFFERSON' OPINION, THE COURT SAID.. WHETHER OR NOT ONE AGREES WITH THIS DECISION, THERE IS NOTHING IN THE CONSTITUTION THAT FORBIDS IT....."

THE NEW YORK STATUTE (SECTION 131-K) TREATS ALL PERSONS WITHIN THE CLASSES ESTABLISHED EQUALLY, AND THE CLASSIFICATION IS A REASONABLE ONE - ILLEGAL ALIENS DO NOT HAVE THE SAME DUTIES AS LEGAL ONES, AND CANNOT COMPLAIN IF THEY ARE CLASSIFIED DIFFERENTLY; FURTHER, THE STATUTE BEARS A REASONABLE RELATIONSHIP TO A PROPER LEGISLATIVE PURPOSE. SIMPLY BECAUSE THE PLAINTIFF IS A PERSON WITHIN THAT CLASS FOR WHICH THE LEGISLATURE HAS STATED THAT NO WELFARE BENEFITS ARE AVAILABLE, THIS DOES NOT OF ITSELF GIVE HER A COLORABLE CONSTITUTIONAL ISSUE, OR A SUBSTANTIAL CONSTITUTIONAL CLAIM.

THE COURTS RECOGNIZE A PRESUMPTION WHICH OPERATES IN FAVOR OF THE REASONABLENESS OF LEGISLATIVE CLASSIFICATIONS, AND IF ANY

STATE OF FACTS CAN REASONABLY BE CONCEIVED THAT WOULD JUSTIFY THE CLASSIFICATION, THE EXISTENCE OF THOSE FACTS WILL BE ASSUMED BY THE COURT TO BE THE BASIS FOR THE CLASSIFICATION IN ORDER TO UPHOLD THE LEGISLATION. LINDSLEY V. NATURAL CARBONIC, 220 U.S. 61.

THE RULE LAID DOWN IN GRAHAM V. RICHARDSON, 403 U.S. 365 APPLIES TO ALIENS WHO ARE LAWFULLY IN THIS COUNTRY - THAT RULE HAS NOT TO DATE BEEN EXTENDED TO COVER PLAINTIFF'S CLASSIFICATION. (SEE; ESPINOZA V. FARAH MANUFACTURING CO., IBID).

THE SUPREME COURT, SPEAKING THROUGH CHIEF JUSTICE HUGHES, IN MCNUTT V. GENERAL MOTORS ACCEPTANCE CORPORATION, 298 U.S. 178, STATED IN GREAT DETAIL THE BURDEN UPON THE PARTY ATTEMPTING TO INVOKE THE JURISDICTION OF THE FEDERAL DISTRICT COURT, SAYING AS PART OF THE COURT'S OPINION THE FOLLOWING:

'...THE PREREQUISITES TO THE EXERCISE OF JURSIDICTION ARE SPECIFICALLY DEFINED, AND THE PLAIN IMPORT OF THE STATUTE IS THAT THE DISTRICT COURT IS VESTED WITH AUTHORITY TO INQUIRE AT ANY TIME WHETHER THESE CONDITIONS HAVE BEEN MET. THEY ARE CONDITIONS WHICH MUST BE MET BY THE PARTY WHO SEEKS THE EXERCISE OF JURISDICTION IN HIS FAVOR. HE MUST ALLEGE IN HIS PLEADINGS THE FACTS ESSENTIAL TO SHO.. JURISDICTION. IF HE FAILS TO MAKE THE NECESSARY ALLEGATIONS, HE HAS NO STANDING. IF HE DOES MAKE THEM, AN INQUIRY INTO THE EXISTENCE OF JURSIDICTION IS OBVIOUSLY FOR THE PURPOSE OF DETERMINING WHETHER THE FACTS SUPPORT HIS ALLEGATIONS. IN THE NATURE OF THINGS, THE AUTHORIZED INQUIRY IS PRIMARILY DIRECTED TO THE ONE WHO CLAIMS THAT THE POWER OF THE COURT SHOULD BE EXERCISED IN HIS BEHALF. AS HE IS SEEKING RELIEF SUBJECT TO THIS SUPERVISION, IT FOLLOWS THAT HE MUST CARRY THROUGHOUT THE LITIGATION THE BURDEN OF SHOWING THAT HE IS PROPERLY IN COURT. THE AUTHORITY WHICH THE STATUTE VESTS IN

THE COURT TO ENFORCE THE LIMITATIONS OF ITS JURISDICTION PRECLUDES THE IDEA THAT JURISDICTION MAY BE MAINTAINED BY MERE AVERMENT, OR THAT THE PARTY ASSERTING JURISDICTION MAY BE RELIEVED OF HIS BURDEN BY ANY FORMAL PROCEDURE. IF HIS ALLEGATIONS OF JURISDICTIONAL FACTS ARE CHALLENGED BY HIS ADVERSARY, IN ANY APPROPRIATE MANNER, HE MUST SUPPORT THEM BY COMPELLING PROOF. AND WHERE THEY ARE NOT SO CHALLENGED, THE COURT MAY STILL INSIST THAT THE JURISDICTIONAL FACTS BE ESTABLISHED OR THE CASE BE DISMISSED, AND FOR THAT PURPOSE, THE COURT MAY DEMAND THAT THE PARTY ALLEGING JURISDICTION JUSTIFY HIS ALLEGATIONS BY A PREPONDERANCE OF THE EVIDENCE....."

POINT 5

NEITHER THE STATE NOR COUNTY COMMISSIONER ARE WITHIN THE PURVIEW OF SECTION 1983.

THE PLAINTIFF'S COMPLAINT IS AGAINST THE STATE AND THE COUNTY, AND NOT AGAINST THE STATE AND COUNTY COMMISSIONERS AS INDIVIDUALS. IF ANY DAMAGES WERE TO BE AWARDED IN THIS ACTION, THEY WOULD BE FORTHCOMING FROM THE PUBLIC FUNDS. AS STATED BY JUDGE MCGOWAN * IN ROTHSTEIN V. WYMAN, 467 F2D 226 (C.A. 2, 1972), CERT. DENIED, 411 U.S. 921. 93 S. CT. 1552.....' IT IS NOT PRETENDED THAT THESE PAYMENTS (RETRO-ACTIVE WELFARE BENEFITS BEING SOUGHT BY PLAINTIFFS) ARE TO COME FROM THE PERSONAL RESOURCES OF THESE APPELLANTS. APPELLEES EXPRESSLY CONTEMPLATE THAT THEY WILL, RATHER, INVOLVE SUBSTANTIAL EXPENDITURES FROM THE PUBLIC FUNDS OF THE STATE.....'

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* SITTING BY DESIGNATION ON THE COURT OF APPEALS FOR THE

THE STATE AND COUNTY COMMISSIONERS IN THIS ACTION ARE ACTING AS REPRESENTATIVES OF THEIR RESPECTIVE GOVERNMENTS, AND NOT IN AN INDIVDUAL CAPACITY. IN THE 'ROSADO' CASE, THE DEFENDANTS WERE SUED INDIVIDUALLY AND AS COMMISSIONERS - IN THE CASE OF DEFENDANT WYMAN, THE TITLE OF THE ACTION SHOWS THAT HE WAS SUED AS COMMISSIONER AND INDIVIDUALLY. NEVERTHELESS, THE COURT HELD AS PART OF ITS DECISION THAT ....."THE COMPLAINT IS AGAINST THE STATE AND THE COUNTY OF MONROE, NOT AGAINST THE COMMISSIONER OF THE NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES AS AN INDIVIDUAL, NOR AGAINST THE COMMISSIONER OF THE MONROE COUNTY DEPARTMENT OF SOCIAL SERVICES AS AN INDIVIDUAL. NEITHER THE STATE COMMISSIONER NOR THE COUNTY COMMISSIONER ARE WITHIN THE SCOPE OF (42 U.S.C.) 1983.....'. (SEE; ROSADO V. WYMAN, 414 F2D 170,178 -REVERSED IN 397 U.S. 397, BUT ON OTHER GROUNDS.).

POINT 6

THE ELEVENTH AMENDMENT TO THE FEDERAL CONSTITUTION BARS THE AWARD OF DAMAGES AND/OR ATTORNEYS' FEES AGAINST THE DEFENDANTS HEREIN.

THE ISSUE AS TO WHETHER RETRO-ACTIVE WELFARE BENEFITS CAN BE AWARDED AGAINST THE STATE WHERE THE PAYMENTS WOULD HAVE TO COME FROM PUBLIC FUNDS IN THE STATE TREASURY, HAS FINALLY BEEN

SECOND CIRCUIT - JUDGE MCGOWAN IS OF THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

SETTLED BY THE RECENT SUPREME COURT DECISION OF EDELMAN V. JORDAN, (_____U.S._____), 94 S. CT. 1347-DECIDED ON MARCH 25, 1974. TRACING THE HISTORY OF THE ELEVENTH AMENDMENT, JUSTICE REHNQUIST STATED THAT THE AMENDMENT WAS RATIFIED IN 1798, AND REMAINS UNCHANGED SINCE THAT TIME. IT READS AS FOLLOWS:

> "...THE JUDICIAL POWER OF THE UNITED STATES SHALL NOT BE CONSTRUED TO EXTEND TO ANY SUIT IN LAW OR EQUITY, COMMENCED OR PROSECUTED AGAINST ONE OF THE UNITED STATES BY CITIZENS OF ANOTHER STATE, OR BY CITIZENS OR SUBJECTS OF ANY FOREIGN STATE....."

JUSTICE REHQUIST STATED THAT....'WHILE THE AMENDMENT BY ITS TERMS DOES NOT BAR SUITS AGAINST A STATE BY ITS OWN CITIZENS, THIS COURT HAS CONSISTENTLY HELD THAT AN UNCONSENTING STATE IS IMMUNE FROM SUITS BROUGHT IN FEDERAL COURTS BY HER OWN CITIZENSAS WELL AS BY CITIZENS OF ANOTHER STATE.....' CITING: HANS V. LOUISIANA, 134 U.S. 1, AND OTHER CASES. GOING FURTHER, HE SAID.....' THUS THE RULE HAS EVOLVED THAT A SUIT BY PRIVATE PARTIES SEEKING TO IMPOSE A LIABILITY WHICH MUST BE PAID FROM PUBLIC FUNDS IN THE STATE TREASURY IS BARRED BY THE ELEVENTH AMENDMENT.....' CITING: GREAT NORTHERN LIFE INSURANCE COMPANY V. READ, 327 U.S. 573, 66 S. CT. 745.

PRIOR TO THE 'EDELMAN' DECISION, THE VARIOUS FEDERAL CIRCUITS DISAGREED ON THE ISSUE OF RETRO-ACTIVE WELFARE BENEFITS. THE SECOND CIRCUIT (ROTHSTEIN V. WYMAN, IBID) HELD SUCH PAYMENTS BARRED BY THE ELEVENTH AMENDMENT EVEN WHEN THEY WERE WRONGFULLY WITHHELD FROM RECIPIENTS. AS STATED BY JUDGE MCGOWAN IN THE COURT'S OPINION.....' AS TIME GOES BY HOWEVER, RETRO-ACTIVE PAYMENTS BECOME COMPENSATORY RATHER THAN REMEDIAL; THE COINCIDENCE BETWEEN PREVIOUSLY ASCERTAINED AND EXISTING NEEDS BECOMES LESS CLEAR.....' (ROTHSTEIN V. WYMAN, IBID AT P. 235).

AS TO THE AWARD OF ATTORNEYS FEES TO AGENCIES AND OR-

GANIZATIONS SUCH AS LEGAL ASSISTANCE CORPORATIONS WHICH REPRESENT PERSONS WITHOUT CHARGE, THIS MATTER HAS FINALLY BEEN SETTLED BY THE DECISION OF THE SUPREME COURT IN THE CASE OF ALYESKA PIPELINE SERVICE CO. V. THE WILDERNESS SOCIETY, _____U.S._____, 43 U.S.L. W. 4549, DECIDED ON MAY 12, 1975.

THERE, THE COURT HELD THAT SUCH FEES, ABSENT SPECIFIC FEDERAL STATUTORY AUTHORITY(OF WHICH THERE APPEARS TO BE NONE,), ARE NO LONGER TO BE AWARDED TO ATTORNEYS AND ORGANIZATIONS WHO PERFORM LEGAL SERVICES WITHOUT REQUIRING FEES FROM THEIR CLIENTS.

ACCORDINGLY, IT IS SUBMITTED THAT BOTH REQUESTS FOR RETRO-ACTIVE WELFARE BENEFITS AS WELL AS THE REQUEST FOR ATTORNEYS' FEES SET FORTH IN THE COMPLAINT HEREIN, SHOULD BE DENIED IN THEIR ENTIRETY.

CONCLUSION

THE DECISION OF THE DISTRICT COURT
WAS PROPER IN ALL RESPECTS, AND
SHOULD BE AFFIRMED IN ITS ENTIRETY.

DATED: ROCHESTER, NEW YORK.
OCTOBER 23, 1975.

RESPECTFULLY SUBMITTED,

CHARLES G. FINCH, CHIEF COUNSEL
CHARLES G. PORRECA, OF COUNSEL,

ATTORNEY FOR DEFENDANT-APPELLEE,
JAMES REED, AS COMMISSIONER OF THE
DEPARTMENT OF SOCIAL SERVICES FOR THE
COUNTY OF MONROE,
111 WESTFALL ROAD,
ROCHESTER, NEW YORK 14620
TELEPHONE: (716) 442-4000

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

GAYLE MC QUOID HOLLEY, Individually and on behalf of JAMES MC QUOID, NORMAN MC QUOID, THOMAS MC QUOID, DOUGLAS MC QUOID, MICHAEL MC QUOID AND ADELAINE MC QUOID, her minor children,	:	
Plaintiffs, Appellants	:	
-against -	:	Docket # 75-7468
ABE LAVINE, as Commissioner of the NEW YORK STATE DEPARTMENT OF SOCIAL SERVICES, and JAMES REED, As Commissioner of the MONROE COUNTY DEPARTMENT OF SOCIAL SERVICES,	:	
Defendants. Appellees	:	

AFFIDAVIT OF SERVICE BY MAIL OF
BRIEF ON BEHALF OF APPELLEE REED

CITY OF ROCHESTER
COUNTY OF MONROE
STATE OF NEW YORK

Charles G. Porreca, Esq., being duly sworn deposes and says that on the 24th day of October, 1975, he served the within Brief on Behalf of James Reed upon K. Wade Eaton, Esq., the attorney for the above named plaintiffs and upon Alan W. Rubenstein, Principal Attorney, Office of the Attorney General, the attorney for Defendant Abe Lavine by depositing three (3) true copies of the same securely enclosed in a post paid wrapper in the Post Office Box regularly maintained by the United States Government at 111 Westfall Road, Rochester, New York 14620 in said County of Monroe directed to the said attorney for plaintiffs at 80 West Main Street, Rochester, New

York 14614 and directed to Alan W. Rubenstein, Principal Attorney at the Department of Law, Albany, New York 12224, that being the address within the state designated by them for that purpose upon the preceding papers in this action, or the place where they then kept an office between which places there then was and now is a regular communication by mail. Deponent is over 18 years of age, is not a party to this action and resides at Rochester, New York.

Charles G. Porreca

CHARLES G. PORRECA

Sworn to before me

this 24th day of October, 1975

Camille Fazio

Commissioner of Deeds